Frederick County Comments

Draft MS4 Permit

September 29, 2014

Frederick County Government

Office of Sustainability and Environmental Resources

Watershed Management Section

September 29, 2014

Contents

I. INTRODUCTION

Frederick County (County) submits the following comments on the Maryland Department of the Environment's (MDE's or Department's) Tentative Determination to issue the County's National Pollutant Discharge Elimination System (NPDES) permit (Draft Permit) for discharges from our municipal separate storm sewer system (MS4). We appreciate the Department's careful consideration of our concerns and recommendations.

II. COUNTY'S ENVIRONMENTAL EFFORTS

The County has worked hard to improve the condition of local waterbodies and the Chesapeake Bay for many years. Our last MS4 permit was issued in 2002. Since then, we have taken a number of steps to reduce the level of pollutants discharged from our MS4. Details regarding our efforts can be found at:

http://frederickcountymd.gov/index.aspx?nid=518.

Our commitment to the Chesapeake Bay and to local waters extends to other County environmental programs and efforts. The County owns and operates twelve wastewater treatment plants, including Ballenger-McKinney WWTP, Crestview WWTP, Fountaindale WWTP, Jefferson WWTP, Kemptown WWTP, Lewistown WWTP, Mill Bottom WWTP, Monrovia WWTP, New Market WWTP, Pleasant Branch WWTP, Point of Rocks WWTP, and White Rock WWTP. We are nearly finished with enhanced nutrient removal (ENR) upgrades to the Ballenger-McKinney WWTP. Now operational, this $105 Million construction project, paid for through a combination of a state ENR grant (via the Bay Restoration Fund), low-interest state loan, American Recovery and Reinvestment Act loan, and local funding, will reduce nitrogen discharges by approximately 63% and phosphorus discharges by approximately 85% per year. In addition, since the 1990s, the County has voluntarily decommissioned smaller plans and consolidated their flow into the Ballenger-McKinney WWTP. This was environmentally beneficial as well.

The County's Office of Sustainability & Environmental Resources also runs a number of programs that positively impact our local environment. For example, the County has a Green Homes Challenge program that educates citizens on ways to reduce their energy usage, on steps to take at home to create a greener environment, and on renewable energy technology. The County is a member of the U.S. Green Building Council and has one LEED-AP and three LEED-Green employees on staff. Two of our own buildings, the Brunswick Library and the Catoctin Creek Nature Center, were built to incorporate green standards. The Nature Center, for example, includes a vegetated roof, a geothermal well field and heat pump system, native plant landscaping and environmental education programs.

We have also updated our website to provide information to the public on related climate change issues.

In conclusion, the County is proud to be an environmental leader in the State. We are fortunate to have a beautiful and serene natural setting for our citizens and visitors to enjoy, and we take our responsibility to the environment seriously.

III. PHASE I PERMIT STATUS

A. Frederick County's MS4 Should Be Permitted as a Phase II MS4

The County has a number of substantive concerns regarding the Draft Permit terms. Preliminarily, however, we feel compelled to bring up a jurisdictional matter that may impact the future course of our program.

As explained in greater detail below, the County believes we have been incorrectly identified as a medium-size Phase I MS4 permittee. Based upon information and belief,[1] the County agreed to be regulated as a Phase I MS4 in the mid-1990s as an accommodation to MDE. In hindsight, however, it is not clear that MDE had the authority to press the County to accept Phase I status.

The County acknowledges that in addition to identifying large and medium Phase I MS4s, MDE had the authority to designate additional municipalities as Phase I MS4s using residual designation authority (RDA) if necessary based on water quality impact concerns. However, we have no evidence that MDE ever took the necessary steps to formally designate the County using RDA, calling into question our regulatory status over the last two decades.

Agreeing to apply for a Phase I MS4 permit in the 1990s likely seemed like a low-risk response to a state agency request. Over the past two decades, however, public and regulatory expectations for MS4 permittees and the level of scrutiny paid to permit compliance have increased exponentially, particularly for MS4s in the Chesapeake Bay Watershed like Frederick County. If MDE issues the County's permit as it is currently written, Frederick County will have one of the most expensive MS4 permits in the entire United States. This is a significant commitment for the County, and brings with it the great risk that if we fail to comply we risk enforcement action or a citizens' suit. We can no longer acquiesce to MDE's past practice. The stakes are simply too high.

[1] On August 25, 2014, the County submitted a Public Information Act request for documentation relating to MDE's decision to identify Frederick County as a Phase I MS4 permittee (Appendix A). Although the County received confirmation that the request was received, we have not received any documentation from MDE in response to the request, nor have we been notified that documentation is available for our review.

For these reasons, we are requesting coverage under the Phase II MS4 GP, which more accurately reflects the size of our system and our capacities with regard to permit implementation. We will be submitting an application in the near future.[2]

B. EPA Phase I and II Rules

EPA issued its Phase I Stormwater Rule (Phase I Rule)[3] in 1990 in response to the Water Quality Act of 1987, which stated that EPA or a delegated state could not require permit coverage for stormwater discharges before October 1, 1992 (later amended to October 1, 1994) except for discharges:

(A) Permitted prior to February 4, 1987;

(B) Associated with industrial activity;

(C) From an MS4 serving a population of 250,000 or more;

(D) From an MS4 serving a population or more than 100,000 but less than 250,000; or

(E) Which the EPA or a delegated state has designated based upon a determination that the discharge is contributing to the violation of a water quality standard or which is a significant contributor of pollutants to waters of the U.S.[4]

Congress did not define an "MS4," nor did it explain what it meant by "serving" a population, both of which are important factors in (C) and (D) above. EPA worked to fill in these blanks in its Phase I Rule.

EPA considered a number of different options for defining an "MS4," but ultimately adopted an approach based upon population (for incorporated places) and urbanized areas (for counties). EPA explained its approach in the Preamble, defining large and medium MS4s as municipal storm sewer systems that:

"(i) Are located in an incorporated place with a population of 100,000 or more or 250,000 or more as determined by the latest Decennial Census by the Bureau of Census (see appendices F and G of part 122 for a list of these places based on the 1980 Census).

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[2] Consistent with federal law, Phase II MS4s are generally regulated only if they are located in Census-designated urbanized areas. In Frederick County's case, per the 2010 Census, the urbanized areas include those areas in the County with a population greater than 50,000. MDP's map highlighting these areas is attached as Appendix B. Note that some of the highlighted areas are independent municipalities with their own MS4 permits. They are therefore not in the County's Service Area.

[3] 55 Fed. Reg. 47990 (Nov. 16, 1990).

[4] Phase I Rule at p. 47992.

(ii) Are located within counties having areas that are designated as urbanized areas by latest decennial Bureau of Census estimates and where the population of such areas exceeds 100,000, after the population in the incorporated places, townships or towns within such counties is excluded (see appendices H and I for a listing of these counties based on the 1980 census) (incorporated places, towns, and township within these counties are excluded from permit application requirements unless they fall under paragraph (i) or are designated under paragraph (iii)); or

(iii) are owned or operated by a municipality other than those described in paragraph (i) or (ii) that are designated by the Director as part of the large or medium municipal separate storm sewer system due to the interrelationship between the discharges of the designated storm sewer and the discharges from municipal separate storm sewers described under paragraphs (i) or (ii)."[5]

As the definition above makes plain, EPA identified a county as a large or medium MS4 if it included census-defined urbanized areas with a population **in such areas** greater than 100,000 after subtracting out incorporated places, townships or towns. (Emphasis added).

EPA did this intentionally in an effort to identify counties that were similar to the large cities listed under (i) of the definition. According to EPA, a listed county "performs many of the same functions as incorporated cities with a population of 100,000." In addition, the listed counties were highly urbanized, like large cities: "Due to the urbanized nature of their population, discharges from municipal separate storm sewers in these counties will have many similarities to discharges from municipal systems in incorporated cities with a population of 100,000 or more."[6]

Using this urbanized area methodology, EPA considered all of the counties in the U.S., and listed all medium MS4 counties by state in Appendix I. EPA then referenced Appendix I in the final regulatory language it adopted at 40 C.F.R. §122.26(b)(7). The reference remains today.

"(7) Medium municipal separate storm sewer system means all municipal separate storm sewers that are either:

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[5] Phase I Rule at p. 48040.

[6] Phase I Rule at p. 48041. *See also* Phase I Proposed Rule (53 Fed. Reg. 49416): "The priorities established in the Act are based on the size of the population served by the system because, in general, discharges from municipal separate storm sewers located in municipalities with higher populations are thought to present a higher potential for contributing to adverse water quality impacts. NURP and other studies have verified that the event mean concentration of pollutants in urban runoff from residential and commercial areas remains relatively constant from one area to another, indicating that pollutant loads from urban runoff strongly depend on the total area of developed land, which in turn is related to population."

(ii) Located in counties listed in appendix I, except municipal separate storm sewers that are located in the incorporated places, townships or towns within such counties;"

EPA's Phase II Stormwater Rule (Phase II Rule)[7] designated small MS4s inside urbanized areas, expanded RDA, and revised the appendices based on the 1990 census. Notably, Howard County was the only county in Maryland added to the Phase I MS4 list.[8] EPA also froze the Phase I MS4 list to include only those cities or counties listed in the appendices:

"EPA is adding those incorporated places and counties whose 1990 population caused them to be defined as a "medium" or "large" MS4. All of these MS4s have applied for permit coverage so the effect of this change to the appendices is simply to make them more accurate. They will not need to be revised again because today's rule "freezes" the definition of "medium" and "large" MS4s at those who qualify based on the 1990 census."[9]

C. Applicability of EPA Rules to Frederick County

In the mid-1990s, when MDE approached the County about applying for Phase I MS4 permit coverage, Frederick County did not qualify under subparagraph (i) (Frederick County is not an incorporated place) or subparagraph (iii) (Frederick County is not interconnected with a larger system of the Phase I Rule). The only legitimate basis MDE would have had for mandating that the County obtain a permit as a medium-sized MS4 was subparagraph (ii) or RDA.

In 1990, Frederick County had a total population of 150,208. According to records compiled by the MDP, **only 58,393** of this population lived in an urbanized area, 28,293 lived outside an urbanized area and 63,522 lived in a rural area.[10] Per subparagraph (ii), Frederick County needed a population in the census-designated area served by the MS4 excluding municipalities greater than 100,000. Thus, based upon 1990 census data and EPA's explanation for how it identified medium MS4s, Frederick County did not qualify.[11]

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[7] 64 Fed. Reg. 68772 (Dec. 8, 1999).

[8] Frederick County was not listed in Appendix I in either the Phase I or Phase II Rules.

[9] Phase II Rule at p. 68749.

[10] Available at:

http://www.mdp.state.md.us/msdc/census/cen2000/Urban_rural/ua_rural2k_cnty.pdf.

A copy of this document is also attached as Appendix C.

[11] The County does not have the urbanized area breakdown for the 1980 census. However, we can estimate this figure based on the fact that 39% of the population lived in the urbanized area in 1990. Assuming a similar percentage lived in the urbanized area in 1980 (total population 114,792), approximately 44,768 lived in the urbanized area. It would be unreasonable to assuming a larger percentage lived in the urbanized area in 1980 as compared to 1990 (i.e., that greater than 39% lived in the urbanized area in 1980), because such an assumption would contradict established development patterns across Maryland for this time period.

D. MDE's Basis for Designation

As noted above, CWA §402(p)(2)(E) authorized the Administrator or a state director to use RDA to designate a discharge based upon water quality considerations.[12] We do not believe MDE identified Frederick County as a Phase I permittee based on water quality impacts. Again, based upon information and belief, we believe MDE based its decision to include several of the medium-sized systems, including Frederick County, on estimates of future population growth for the entire County (not just in the urbanized area).

This was inappropriate for two reasons. First, it relied on an estimate of growth that had not yet actually occurred. Second, we find nothing in the Phase I Rule that even hinted that state regulators should consider growth potential when identifying Phase I MS4 permittees. The 100,000 population figure in the CWA and federal regulations was the ***minimum*** population that must be achieved for designation to occur, and until a county reached that figure, there was no basis for including them.

The County believes that MDE ignored both the Preamble to the Phase I Rule and the regulations themselves, and chose instead to develop its own approach to identifying Phase I permittees. MDE has not, to date, justified its approach based upon federal or state law.

Lastly, MDE cannot simply issue a Phase I permit today based on the theory that the County has now crossed the 100,000 population mark. The Phase I list closed in 1999 based on the 1990 census. As noted above, Frederick County did not qualify using the 1990 figure.

For this reason, Frederick County objects to reissuance of this Phase I MS4 permit. The County's MS4, limited to facilities located in the urbanized area per the 2010 Census, should be regulated as a small MS4 under the terms of the existing General Permit.

IV. PERMIT SCOPE AND PROCESS

Assuming MDE disagrees with the County's legal argument on our MS4 status, and issues the Phase I MS4 permit over our objection, the permit must be consistent with a maximum extent practicable (MEP) level of effort, consistent with CWA §402(p)(3)(B)(iii) (further discussion below in Part V of these comments).

Without waiving our rights to argue that the County should be regulated as a Phase II MS4, we would be willing to consider accepting a Phase I MS4 permit if it (1) adequately incorporates the County's proposed revisions as set forth in these comments, our MEP Analysis (attached as Appendix D), and the

[12] There are rules to follow if this authority is used. EPA explained in the Phase I Rule that it would make case-by-case designations "under regulatory procedures found at 40 CFR 124.52." Phase I Rule at p. 47993. These procedures include notifying the discharger in writing that they must seek permit coverage, providing reasons for the determination, and allowing at least 60 days for submittal of the application.

attached maximum extent practicable permit (MEP Permit) (attached as Appendix E) (both MEP documents explained below) and (2) is not otherwise altered after the public comment period without our concurrence.

In terms of scope, the Draft Permit is a significant step-up from current requirements. In the MEP Analysis, we have identified all tasks that are either entirely new or greatly expanded. A number of these terms are not achievable either because of cost or scheduling or because they are impossible to accomplish even with unlimited funding and time. The County's MEP Analysis identifies these tasks as beyond the MEP.

Special note is made of cost. Based upon our analysis, we believe it would cost the County approximately $126,677,501 (in 2017 dollars), or $21,112,916.83 on average per each of the six fiscal years of the five year permit, just to comply with the 20% restoration requirement. When added to other permit requirements (estimated at $15,568,509), the total cost is $142,346,010.20, or an average $23,724,335.03 per fiscal year. This translates to approximately $462 per stormwater fee ratepayer per fiscal year.[13]

Furthermore, three separate consultants reviewing the costs prepared for our MEP Analysis stated that the permit is not physically possible to execute in five years. In terms of scheduling, the new permit increases the pace of implementation, particularly with regard to watershed restoration, without considering the County's inability to control all aspects of restoration projects. If we are obligated to seek a permit for installation of a BMP, we do not control the review and approval timeline.[14] Only $104,852,801 of permit-required tasks are deemed physically possible to execute in the five year permit before considering cost limitations.

The County is currently funding the program using General Fund and stormwater fee dollars. In the years leading up to fiscal year 2014, the County was spending an average of approximately $2.5 Million per year to address MS4 permit requirements. In FY'14 it spent an estimated $3,559,136. In FY'15 it has budgeted $5,349,890. The new permit costs 443% of the current funding level. We are stunned that MDE would issue a Draft Permit that carries this level of increase. As our MEP Analysis explains, we are unaware of any municipal fee that has ever increased anywhere near this level over a one-year period. We object to asking our citizens to choose between funding stormwater management or public education, safety, and other important social programs.

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[13] Calculation based upon 49,485 stormwater utility accounts.

[14] In its *Evaluation of Maryland's 2012-2014 and 2014-2015 Milestones*, issued June 26, 2014, EPA acknowledged that delays in permitting are a significant issue for stream restoration projects in particular. EPA has stated that it is: "… working with" the Army Corps of Engineers, Baltimore District, "to improve the efficiency of the permitting process for stream restoration…" This document is available at: http://www.epa.gov/reg3wapd/tmdl/2014Evaluations/MD.pdf

Finally, parts of the Draft Permit cannot be accomplished even if the County had unlimited funding and an indefinite amount of time. For example, the Draft Permit requires that the County develop a litter and floatables program with a goal of "elimination" of these materials. Eliminating litter and floatables will never occur. It is not a realistic goal, and should not be referenced in a federal permit as the basis for future local planning.

The County has determined that we cannot achieve the terms of the Draft Permit as written. Based on other recent Phase I MS4 reissuance proceedings,[15] we are concerned that third parties may seek in their comments to impose even more stringent and more expensive permit requirements.[16] We object to any efforts to do so given the overall scope and level of burden associated with the Draft Permit.

For all of these reasons, the County requests that MDE not add requirements to the Draft Permit, either on its own or in response to public comments. The County specifically reserves the right to challenge any or all requirements of the final permit if they exceed MDE's statutory authority, are not required by law, or conflict with state or federal law or applicable regulations. The County also reserves the right to request appropriate modifications to the permit if the Department changes permit terms in future MS4 permits due to litigation or as it gains experience over time.

Specific comments regarding the Draft Permit follow in Part V of these comments.

[15] The County has commented on every Phase I MS4 permit reissuance since 2012, including repeatedly raising concerns regarding MDE's "template" approach to issuing Phase I permits without considering individual community goals and capabilities. Copies of these comments are attached as Appendix F.

[16] For example, the County is aware that environmental groups may want even more expansive monitoring requirements in the final permit. The County objects to expanding what is already a very robust monitoring program at great additional cost and for no additional benefit. The County supports the monitoring requirements in the permit as-is and believes they are consistent with MEP.

V. COMMENTS REGARDING THE DRAFT PERMIT

A. MEP Compliance Standard

1. MEP is The Legal Compliance Standard for MS4s [17]

MDE has included MEP references in Parts III, IV.D, IV.E, and VII of the Draft Permit, and the County supports these references to the extent that they appropriately reflect the MEP legal compliance standard. [18]

Part III of the Draft Permit also states that implementation of Parts IV through VII will constitute adequate progress towards water quality standards (WQS) compliance. Although the County submits that there is no legal requirement that an MS4 permit include ***any*** references to WQS or TMDL wasteload allocations (WLAs), we can conceptually support this language as a reasonable compromise that has been used elsewhere in Region III (for example, in the 2012 MS4 permit issued to the District of Columbia).[19]

CWA §402(p)(3)(B)(iii)[20] establishes MEP as the legal compliance standard for MS4 permits, and requires that they "include controls to reduce the discharge of pollutants to the ***maximum extent practicable***, including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants" (Emphasis added). MS4 permits should not include any reference to strict compliance with

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[17] The County objects to any permit requirement that is beyond that which is practicable for the County and concurs with and adopts as its own the general position of the Maryland Association of Counties (MACo) and the Maryland Municipal Stormwater Association (MAMSA) as set forth in their amicus brief attached as Appendix G hereto.

[18] For consistency, the County suggests that the text at Part VII.A (Discharge Prohibitions and Receiving Water Limitations) include a cross-reference to Part III. Without a cross reference, it is unclear what the relationship is between Part III and Part VII.A. Part VII.A could be read as inappropriately requiring additional steps be taken to address water quality. In the alternative, MDE could delete the second paragraph of Part VII.A.

[19] MDE has included this language in the Phase I permit reissuances for the City of Baltimore, Baltimore County, Prince George's County, and Anne Arundel County. The County does have one minor suggestion. The second half of Part III could be better linked to the first half to clarify the intention of the section. More specifically, the text that begins with "Compliance with all conditions…" could cross reference the first paragraph: "Compliance with all conditions…toward compliance with Maryland's receiving water quality standards and any EPA approved stormwater WLAs for this permit term. Maryland's water quality standards and WLAs are referenced in subparagraphs (1) and (2) above."

[20] 33 U.S.C. § 1342(p)(3)(B)(iii).

WQS or TMDL WLAs (which are water quality standards in a different form). If MDE chooses to do so over the County's objection, references must be qualified with appropriate MEP language.

In 1987, Congress deliberately amended the CWA to change the standard for municipal stormwater dischargers to one focused on "practicability." Before the 1987 amendments to the CWA, municipal and industrial stormwater dischargers were both subject to strict compliance with water quality standards. In amending the statute in 1987, "Congress retained the existing, stricter controls for industrial storm water dischargers[21] but prescribed new controls for municipal storm water discharge," i.e., the less-stringent "maximum extent practicable standard."[22]

Several courts have affirmed the applicability of the MEP standard to MS4 permits and the lack of any legal mandate to require strict compliance with WQS or TMDL WLAs.

In *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), the Court was presented with a challenge to EPA's Phase I Rule, including EPA's decision not to require minimum criteria or performance standards for municipal stormwater discharges. In ruling against the petitioners, the court summarized the law as follows:

"Prior to 1987, municipal storm water dischargers were subject to the same substantive control requirements as industrial and other types of storm water. In the 1987 amendments, ***Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge."[23]***

In response to the petitioners' objection that the regulation contained no minimum criteria or performance standards for MS4 discharges, the Court concluded that Congress gave EPA the discretion to determine what controls are necessary:

"Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements . . . . NRDC's argument that the EPA rule is inadequate cannot prevail in the face of the clear statutory language and our standard of review. ***Congress could have written a statute requiring stricter standards, and it did not***."[24]

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[21] Unlike MS4 discharges, industrial discharges must "meet all applicable provisions of . . . section 1311," including the requirement that permits for these discharges achieve water quality standards compliance. 33 U.S.C. §§ 1311(b)(1)(C), 1342(p)(3)(A).

[22] Defenders of Wildlife, 191 F.3d at p. 1165 (quoting Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1308 (9th Cir. 1992)).

[23] *Defenders* at p. 1308 (Emphasis added).

[24] *Defenders* at p. 1308 (Emphasis added).

Seven years later, in *Defenders of Wildlife v. Browner*,[25] several environmental groups objected to MS4 permits issued to five Arizona municipalities, arguing that they must contain limitations ensuring strict compliance with WQS pursuant to CWA §301(b)(1)(C). The Court disagreed, holding that CWA §402(p)(3)(B), the structure of the CWA as a whole, and precedent "all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly" with WQS.[26] In rejecting the petitioners' argument that the statute was ambiguous, the Court reasoned that "Congress' choice to require industrial storm-water discharges to comply with [CWA §301], but not to include the same requirement for municipal discharges, must be given effect."[27] The Court concluded that § 402(p)(3)(B) "replaces" the requirements of §301(b) with the MEP standard for MS4 discharges, and that it creates a "lesser standard" than §301(b) imposes on other types of discharges.[28] If § 301(b) continued to apply to MS4 discharges, the Court reasoned, the "more stringent" requirements of that section would always control.[29] The § 402(p)(3)(B)(iii) "maximum extent practicable" standard is a "lesser standard" than that of § 301(b)(l)(C), because § 301(b)(1)(C) requires water quality standards, when applicable, to be met "without regard to the limits of practicability." [30]

State law does not change the federal MEP compliance standard. The Department issues discharge permits pursuant to the Environment Article, §9-324: "Subject to the provisions of this section, the Department may issue a discharge permit if the Department finds that the discharge meets: (1) All

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[25] *Defenders* at p. 1159 (9th Cir. 1999).

[26] *Defenders* at p. 1166.

[27] *Defenders* at p. 1166.

[28] *Defenders* at p. 1165.

[29] *Defenders* at p. 1166.

[30] *Defenders* at p. 1163. *See also Tualatin Riverkeepers v. Oregon Department of Environmental Quality*, 230 P.3d 559, 564 n.10 (2010) ("Federal law generally requires that discharges pursuant to NPDES permits must strictly comply with state water quality standards. However, under 33 U.S.C. section 1342(p)(3)(B), dischargers of municipal storm water are not subject to that requirement."); *Conservation Law Foundation, Inc. v. Boston Water and Sewer Commission*, No. 10-10250-RGS, 2010 WL 5349854, at *5 (D. Mass. Dec. 21, 2010) ("The Clean Water Act does not mandate that permits issued by EPA for municipal stormwater discharges require compliance with numeric water quality standards."); *NRDC v. N.Y. State Dep't of Envt'l Conserv.,* 111 A.D.3d 737, 748 (N.Y. App. Div. Nov. 13, 2013); *Mississippi River Revival, Inc. v. City of St. Paul*, No. CIV. 01-1887 DSDSRN, 2002 WL 31767798, at *6 (D. Minn. Dec. 2, 2002) ("[w]hile CWA requires permits to contain conditions that ensure that water quality standards are met, the CWA specifically exempts municipal storm water permittees from that requirement.") (later in *Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Ctrl. Agency*, 66 N.W.2d 427 (Minn. Ct. App l2003), a Minnesota state court reached the same result); *City of Abilene v. EPA*, 325 F.3d 657, 659-60 (5th Cir. 2003) (characterized MS4 permits as "management permits" versus "numeric end-of-pipe permits" like those for industrial stormwater).

applicable State and federal water quality standards and effluent limitations; and (2) All other requirements of this subtitle." (Emphasis added). Further, COMAR 26.08.04.02(A) states that the Department "shall issue or reissue a discharge permit upon a determination that: (1) The discharge or proposed discharge specified in the application is or will be in compliance with all ***applicable*** requirements of: (a) Effluent limitations, (b) Surface and ground water quality standards, (c) The Federal Act, (d) State law or regulations, and (e) Best available technology and (f) Federal effluent guidelines;" (emphasis added). As explained above, federal law does not mandate that MS4s comply with WQS. Therefore, State or federal WQS are not ***applicable*** to MS4 discharge permits.[31]

2. MEP is Consistent with the Realities of Managing Urban Stormwater

Congress' 1987 decision to adopt MEP for MS4 permits appropriately recognized the different abilities of a traditional point source (wastewater treatment plants, manufacturing facilities) versus an MS4 to treat pollutants before they are discharged from the system.

MS4s manage precipitation, which fluctuates on an hourly, daily, monthly, and yearly basis and on a waterbody-to-waterbody basis. Additionally, many MS4s have hundreds of outfalls associated with the system. The MEP compliance standard acknowledges these inherent challenges relating to "[t]he magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow."[32] EPA structured its stormwater rules to focus on installing best management practices (BMPs) to the MEP, with BMPs used in lieu of effluent limitations because compliance with numeric end-of-pipe limits is infeasible.

3. MDE Agrees that Strict WQS Compliance is Not Required in an MS4 Permit

MDE agrees that MEP is the correct compliance standard for an MS4 permit. In its Maryland Rule 7-207 Memorandum (p. 14) in the litigation regarding Montgomery County's MS4 permit (Case No. 339466-V), MDE argued to the Montgomery County Circuit Court that MS4 permits should not include numeric limits because:

These regulations are not applicable to municipal stormwater. These regulations require permit conditions sufficient to satisfy water quality standards where compliance with water quality standards is required or where the permit is developing water quality based effluent limitations. ***In the case of***

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[31] Any state regulatory reference to permits achieving water quality standards are simply boilerplate copied from the general national regulation, 40 C.F.R. Part 122, which pre-dates the MS4-specific 1987 CWA amendments. Thus, these provisions simply are ***not applicable*** to MS4s. In addition, to the extent arguments are made by others that strict compliance with WQS can be included at the permit-issuing authority's discretion based upon a review of *Defenders of Wildlife*, the County submits that the language often quoted to support this faulty proposition is purely *dicta* and is not a holding of the Ninth Circuit. The phrase in the CWA "and other such provisions" modifies "maximum extent practicable"; it is not a stand-alone phrase that authorizes requirements beyond MEP.

[32] Phase I Rule at p. 48038.

municipal stormwater, however, the permit is required to impose controls to reduce pollutants to the MEP. (Emphasis added). [33]

MDE has continued to support MEP as the MS4 compliance standard in its appeal to the Court of Special Appeals regarding the Montgomery County Circuit Court decision. MDE has stated that:

"This issue of whether municipal stormwater must meet water quality standards was laid to rest 27 years ago. When the Clean Water Act was amended in 1987, it replaced the water quality standard with the maximum-extent-practicable standard, and replaced numeric effluent limitations with "management practices," "control techniques," "system, design and engineering methods," and other provisions that the State "determines appropriate." [citation omitted] Federal courts have repeatedly held that the Clean Water Act does not require municipal separate storm sewerage system discharges to comply with water quality standards. [citations omitted]"[34]

MEP is the correct legal compliance standard for MS4 permits. For this reason, it is legally appropriate to reference MEP throughout the MS4 permit.

4. Imposing a Requirement for Strict WQS Compliance Would Have Devastating Impacts on the County

The County is aware that some members of the environmental community have previously argued that MDE must include a requirement for strict WQS compliance in an MS4 permit. Not only is this premised on an incorrect reading of federal and state statutes, but, from a practical perspective, it would have a devastating financial impact on the County.

To illustrate the severe financial implications of this idea, we highlight the costs associated with the Chesapeake Bay TMDL, which only addresses nitrogen, phosphorus, and sediment. For the County, we estimate a five-year cost to meet the 20 percent impervious area restoration requirement of $126.7 Million (in 2017 dollars). This roughly equates to an average of approximately $462 per ratepayer of the county's stormwater fee. This 20%, however, represents, only a portion of the work we assume MDE expects we will do to address the Bay TMDL. MDE may include another 20% restoration requirement in the next permit (approximately 2020-2025). If we were forced to comply, the cost liability incurred from

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[33] MDE has also argued in this litigation that any state law references referencing compliance with WQS do not apply to MS4 permits for the same reasons we have discussed above. Pertinent portions of MDE's Memo are attached as Appendix H.

[34] Brief of Appellant, Maryland Department of the Environment, p. 14. Pertinent pages of this brief and the MDE reply brief in the Court of Special Appeals litigation are attached as Appendix I. EPA has also recently agreed in a 2013 legal brief in another permit proceeding that MS4 permits are subject to a unique compliance standard, MEP. *In re Buckley Air Force Base*, NPDES Appeal No. 13-07 (Doc. 21) (E.A.B. 2013), EPA Resp. at 6. EPA also cites MEP in its 2008 *TMDLs to Stormwater Permits Handbook*.

each year of the permit would double to a staggering $924 per household or commercial account plus O&M obligations from the first permit cycle.

Unfortunately, the price tag of $126.7 Million to address the Bay TMDL in the next permit cycle is just the tip of the iceberg. The Bay TMDL is only one of the TMDLs the County will be required to address during this permit cycle. According to MDE's new TMDL Data Center, the County's MS4 has 14 additional TMDLs (some with aggregated WLAs) for bacteria (Double Pipe Creek, Lower Monocacy River, Upper Monocacy River), phosphorus (Catoctin Creek, Double Pipe Creek, Lower Monocacy River, Upper Monocacy River, Lake Linganore), and TSS (Catoctin Creek, Double Pipe Creek, Upper Monocacy River, Lower Monocacy River, Potomac River Montgomery County, and Lake Linganore).

The County also submits that such an extraordinary scope of work is technically and physically impossible to accomplish in five years. This is confirmed by the fact that even Montgomery County, whose permit was issued in 2010, has publicly stated that it is finding it impossible to meet the 20% restoration requirement. The County wants to be clear. We hold Montgomery County's program in high regard. It has what is likely the most well-funded stormwater pollution reduction effort of any county in the state, and has done nothing but work hard to improve water quality for years. Yet, Montgomery County has publicly stated that it will likely not meet the ambitious 20 percent impervious area restoration requirement by the February 2015 permit deadline.[35] Given this reality, and that Frederick County's resources are dwarfed by Montgomery County's, there can be no justification for making compliance still more impossible by imposing strict WQS. The law never requires the impossible.[36]

B. County Approach in Conducting MEP Analysis

With the MEP standard in hand, the County took the next step and prepared an MEP Analysis for our community that reflects the maximum practicable level of effort we can accomplish over the coming permit term. We did this to give MDE specific recommendations on how to revise the Draft Permit in a way that is achievable for the County.

1. Background on EPA Definition of MEP

EPA has stated that MEP is flexible and depends on individual community factors. For this reason, EPA has refused to define MEP in its regulations. In 1999, commenters to the Phase II MS4 Rule "argued

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[35] *See* FY15 Operating Budget: Department of Environmental Protection 12 & Att. 33 (May 9, 2014). Available at:

http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=100

&clip_id=7232&meta_id=64905 (projecting that only "3,634 acres of impervious out of the 3,976 impervious acres restoration goal" will be completed, "***under construction***," or "***in design***" through the FY2015, which ends June 30, 2015) (emphasis added). A copy of this document is attached as Appendix J.

[36] *Sri Int'l v. Matsushita Elec. Corp. of Am*., 775 F.2d 1107, 1121 (Fed. Cir. 1985).

that…EPA needs to further clarify the MEP standards by providing a regulatory definition that includes recognition of cost considerations and technical feasibility."[37] EPA refused: "EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting."[38]

EPA correctly acknowledged in 1999 that not all MS4s are alike with regard to their capacities to reduce pollutants from stormwater discharges. EPA even went so far as to direct small MS4s to "determine [their own] appropriate BMPs" based on the six minimum control measures in the Phase II Rule. To give MS4 communities guidance, EPA listed factors to consider including: MS4 size; climate; implementation schedules; current ability to finance the program; beneficial uses of receiving water; hydrology; geology; and capacity to perform operation and maintenance.

MDE should tailor the specific requirements of an individual permit to match each MS4's ability to reduce pollutants to the MEP. If the MS4 permit is generally consistent with the federal regulatory requirements, this should be acceptable to EPA, based upon its earlier statements regarding MEP.

2. Development of the County's MEP Analysis and Permit

Using EPA's MEP factors, the County developed an MEP Analysis.[39]

To prepare the MEP Analysis, the County first identified new or expanded parts of the Draft Permit that exceed MEP because of impracticability. Once the County analyzed the Draft Permit using the MEP factors, the County created an MEP Permit (by redlining the Draft Permit). In some cases, the County revised an MDE permit requirement to make it achievable. In others, when the County did not find a way to rehabilitate a particular term, the County deleted it.

The County's decision to revise or delete a particular term was based upon a thorough analysis regarding future costs, project scheduling, and other factors. In fact, with regard to the restoration requirement, which is the single most expensive part of the Draft Permit, the County developed a preliminary restoration plan with a schedule of capital projects the County would consider to meet the restoration requirement.[40]

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[37] Phase II Rule at p. 68754. EPA has clearly stated that MEP applies to both Phase I and Phase II MS4s.

[38] Id.

[39] The County submitted its *Preliminary Analysis of Maximum Extent Practicable for the Draft MS4 NPDES MS4 Permit Requirements* to MDE in October, 2012 based upon a draft permit dated June 22, 2012. This Preliminary Analysis is attached as Appendix K. The County has revised this MEP Analysis based upon the Draft Permit and submits it with these comments in final form.

[40] As with many other documents prepared to address future requirements and events, the County has used good faith efforts to prepare a preliminary analysis of restoration program options. This analysis does not bind the County Commissioners or obligate the County to take this particular approach if the permit is issued to require 20% restoration of untreated impervious areas.

The County's outside counsel, AquaLaw PLC, then hired a nationally-known engineering firm with no relationship to Frederick County to conduct an independent review of Frederick County's preliminary restoration plan to determine whether the inputs were reasonable.[41] Based upon this review, the County accepted the recommendations from the third party review. AquaLaw then submitted the revised plan to a second consultant, Municipal & Financial Services Group (MFSVG) an expert on municipal utility cost-of-service and ratemaking, for an opinion on the financial feasibility of the plan.[42] Finally, a third consultant reviewed the overall impact of the Draft Permit on the economic well-being of the County's residents and businesses.[43]

Based upon this expert review, the County estimates it would cost $126.7 Million to comply with the restoration requirement in the Draft Permit. This would necessitate a 428% increase in the stormwater costs per ratepayer projected for the stormwater utility fee in year one of the permit. This is untenable. We are not aware of any private or public utility that has sought and received an increase of this magnitude once, much less on an annual basis. This economic reality is one of the primary reasons we have concluded that restoring 20% county-wide exceeds MEP.

However, we do believe, based on recommendations by MFSVG regarding a reasonable escalation of stormwater funding and fees, that we could accomplish restoration of 13.5% of the untreated impervious area in the service area (not County-wide) that is subject to county-ownership, or 416 acres. This is our MEP with regard to this permit term. If MDE issues the County a Phase I MS4 permit, it must legally reflect this restoration requirement, as well as other MEP terms.

C. Detailed Comments and Revision Requests (Draft Permit and Fact Sheet)

The County's MEP Analysis and MEP Permit explain the County's recommended changes in individual permit requirements. However, additional support, much of which is premised on a review of the legal requirements of federal and state law, is provided below.

[41] Brown and Caldwell reviewed whether the County could realistically design and construct its proposed restoration projects in the order presented on a five-year timeframe. This analysis is provided as Appendix L.

[42] Municipal & Financial Services Group (MFSVG) reviewed whether the County will have the financial capacity to pay for the projects listed in the revised restoration plan without imposing a financial burden on the community or its citizens. This analysis is provided as Appendix M.

[43] The Sage Group reviewed high-level economic impacts on the County, its citizens, and its businesses as a whole. This analysis is provided as Appendix N.

1. MDE Has Incorrectly Defined the Regulated Area Covered by the Permit

i. Federal Law Regulates the MS4, Not the Jurisdiction

Part I.B of the Draft Permit correctly defines the Permit Area as covering "all stormwater discharges from the municipal separate storm sewer system (MS4) owned or operated by Frederick County, Maryland." Part IV.D correctly states that the management programs "shall be implemented in areas served by Frederick County's MS4."

In contrast, Part IV.E.2.a of the Draft Permit imposes restoration requirements across the entire jurisdiction consistent with MDE's *Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated, Guidance for National Pollutant Discharge Elimination System Stormwater Permits* (hereinafter, *Stormwater Accounting Guidance*).[44]

Also, in the Draft Fact Sheet, MDE explains "Since the inception of the NPDES municipal stormwater program, MDE has considered permit coverage to be jurisdiction-wide." MDE justifies its position on EPA's Phase I Stormwater Rule, the jurisdiction-wide application of several state programs (for example, E&S [erosion and sediment control], and the presence of a roads system across the entire jurisdiction for most localities that "generates stormwater discharges)."[45]

The County objects to expanding the permit beyond areas regulated by federal law. There is no legal basis for doing so under federal law, and MDE has not cited any authority under state law.

EPA's intent to focus its regulatory efforts on stormwater ***facilities*** owned by a municipal entity is clear based on how it defined MS4.[46] In 1999, EPA made this even clearer, defining the boundaries of the regulated area to include only those areas with stormwater facilities.[47]

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[44] Part IV.C also requires that the County identify sources of stormwater "countywide…," instead of properly mandating an investigation of sources that discharge to the MS4.

[45] Draft Fact Sheet at p. 3.

[46] 40 C.F.R 122.26(b)(8).

[47] 64 Fed. Reg. 68750. *See also* Phase I Rule at p. 48040 ("There is no indication in the language of the CWA or the legislative history that Congress intended that the scope of "municipality" and the scope of "municipal separate storm sewer system" to be identical, particularly since the latter term is not defined in the statute.") and at p. 48041 ("EPA recognizes that some of the counties addressed by today's rule have, in addition to areas with high unincorporated urbanized populations, areas that are essentially rural or uninhabited and may not be the subject of planned development. While permits issued for these municipal systems will cover municipal system discharges in unincorporated portions of the county, it is in the intent of EPA that management plans and other components of the programs focus on the urbanized and developing areas of the county. Undeveloped lands of the county are not expected to have many, if any, municipal separate storm sewers.")

EPA's definition of MS4 is consistent with the CWA's regulation of "point source discharges" which focus on a specific facility (a pipe, ditch, etc.) that discharges to waters of the U.S. [48]

Large portions of the County are rural with very few or no stormwater facilities. MDE should not by law apply federal MS4 requirements to these areas simply because state law requirements apply across the entire jurisdiction. MDE's decision to do so, over the County's objection, could result in possible enforcement claims for alleged permit violations in areas with no stormwater facilities. More significantly, expanding the regulatory footprint would increase the cost of complying with the restoration requirement by many orders of magnitude.

ii. MDE Has No State Law Authority to Regulate the Entire Jurisdiction

MDE has state code authority to regulate soil erosion control programs[49] and post-construction stormwater management[50] as a part of land development or redevelopment. Nothing the in state code gives MDE the authority to use an MS4 permit as a vehicle for regulating existing development across an entire county.

The County requests that MDE revise the Draft Permit to limit all mandates to areas served by County-owned stormwater facilities (the "service area"). Further, the following areas should be excluded from the service area: areas draining to SHA owned or operated roads, storm sewers in discrete areas (such as individual buildings), areas with direct discharges to local waterways, already permitted stormwater systems, unpermitted state and federal properties, forests, and rural zoning (properties equal to or greater than 5 acres and with a maximum impervious coverage of 10%). Proposed text to accomplish this revision is included in the MEP Permit attached as Appendix E. Additional information regarding the County's position regarding the proper service area is provided in the MEP Analysis.

2. The 20% Restoration Requirement is Not Achievable

Part IV.E.2.a of the Draft Permit obligates the County to "commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the MDE document described in Part IV.E.2.a that has not been already restored to the MEP…" The County opposes this requirement as a major, unprecedented financial burden on the County and, by extension, on the residents of the County who will bear the high compliance costs. We are disappointed that MDE continues to avoid a careful review of the burdens

[48] 33 U.S.C. § 1362.

[49] Md. Code ENV § 4-101.

[50] Md. Code ENV § 4-203.

associated with this new provision, and question how MDE could conclude that there is sufficient record evidence to issue a final permit in light of these substantial concerns.[51]

On a related note, Part VI.A of the Draft Permit states that the restoration requirement is meant to address the Chesapeake Bay TMDL "as described in Maryland's Watershed Implementation Plan [WIP]." However, the Draft Permit is inconsistent with and more onerous than the WIP. The WIP applies the 20% restoration equivalency percentage to "pre-1985 impervious cover."[52] The Draft Permit includes a far larger area – all of the untreated impervious area consistent with the methodology in MDE's *Stormwater Accounting Guidance*, which generally applies the restoration requirement to all pre-2002 development. The Draft Permit also omits the WIP equivalency provision that allows the permittee to use trading to achieve pollutant reductions.

For the reasons above, the County requests that MDE revise the permit and require the County to commence and complete the implementation of restoration efforts for 13.5% or 416 acres of the impervious area in the service area that is County-owned (this is a smaller subset of the service area) and that is not already restored to the MEP. In addition, the MDE should revise the restoration requirement to make it consistent with the WIP. Proposed text is included in the MEP Permit attached as Appendix E.

3. ESD to the MEP Does Not Apply to MS4 Permits

Part IV.E.2.a of the Draft Permit states that: "Equivalent acres restored of impervious surfaces, through new retrofits or the retrofit of pre-2002 structural BMPs, shall be based upon the treatment of the WQv [water quality volume] criteria and associated list of practices defined in the *2000 Maryland Stormwater Design Manual*. For alternate BMPs, the basis for calculation of equivalent impervious acres restored is based upon the pollutant loads from forested cover;" The County opposes including this language in the final permit for the following reasons.

First, the *2000 Maryland Stormwater Design Manual* is fundamentally inconsistent with MDE's *Stormwater Accounting Guidance*, which is also referenced in the Draft Permit.[53] If a developer is required to provide stormwater management for a particular development, the *Design Manual* states that the developer must "[a]t a minimum" use ESD techniques to "address both Rev [recharge] and WQv

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[51] MDE's answer in previous proceedings that the jurisdiction can simply use its stormwater fee to pay for programs is conclusory and fails to recognize the realities of setting utility rates at the local level. See, for example, MDE's *Basis for Final Determination to Issue Anne Arundel County's National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit* at p. 20.

[52] Final Phase II WIP, App. A at p. A-10.

[53] The quoted text is also confusing in that it references "the methodology described in the MDE document cited in PART IV.E.2.a." There are two different documents cited in this section.

requirements…"[54] WQv is "the storage needed to capture and treat the runoff from 90% of the average annual rainfall. In numerical terms, it is equivalent to an inch of rainfall multiplied by the volumetric runoff coefficient (Rv) and site area."[55] Thus, developers must manage stormwater based on a 1" rainfall. In contrast, the *Stormwater Accounting Guidance* allows for stormwater management of less than 1". "When less than 1 inch of rainfall is treated, impervious area treatment credit will be based on the proportion of the full WQv treated."[56]

Although the *Stormwater Accounting Guidance* encourages permittees to treat the full 1" WQv, MDE recognizes that this may be impossible in certain scenarios ("Because of numerous constraints inherent in the urban environment, meeting the design standards specified in the manual may not always be achievable.")[57]

As explained above, the 20% restoration requirement is not achievable. Any possibility for implementing a reasonable number of restoration projects greatly diminishes if MDE requires that each project treat the full WQv.

Second, the requirement that projects be based on the "associated list of practices" in the *Design Manual* is unclear. The Draft Permit could be read to mean that the County must use ESD techniques before structural controls. Not only would this result in a skyrocketing of costs (if ESD measures are even possible), but this would apply a law written for land development to existing development. The County strongly believes this would be contrary to the General Assembly's intent when it passed the Stormwater Management Act of 2007.

Third, the Draft Permit provides no definition of "alternate BMPs." Moreover, the *Stormwater Accounting Guidance* links the amount of credit for these types of practices to individual factors that may or may not be related to pollutant loads from forested cover. In contrast, the Draft Permit suggests that all calculations must be based on forested cover. This creates an inconsistency between the second sentence and the previous requirement that the County use the *Stormwater Accounting Guidance* to calculate credits.

For all of these reasons, Frederick County requests that MDE delete the sentences quoted above from the Draft Permit.

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[54] Design Manual at 5.2.1.

[55] Design Manual at 2.1.

[56] *Stormwater Accounting Guidance* at 3.

[57] *Stormwater Accounting Guidance* at 8.

4. Watershed Assessment and TMDL Planning Terms Are Impracticable

Part IV.E.1.a of the Draft Permit mandates that the County "complete detailed watershed assessments for the entire County" by the end of the permit term. Part IV.E.2.b of the Draft Permit requires that the County engage in planning within one year of permit issuance.[58] The County objects to both of these requirements for the reasons stated below.

i. Requiring a Final Date for Meeting WLAs is Inconsistent with MEP

Requiring that the County include a "final date for meeting applicable TMDLs" in its TMDL plan is legally inconsistent with MEP. In fact, there is no legal requirement that MS4 permits even include TMDL requirements, much less provisions mandating compliance with a WLA by a date certain.[59]

From a practical perspective, the County also questions how we could possibly write a TMDL plan that includes a "final date for meeting applicable WLAs and a detailed schedule for implementing" projects. Installing BMPs may take decades, making setting a "final date" a very difficult proposition. Assuming we were able to establish a defensible final date, too many unknown factors could impact the implementation schedule to make a "detailed schedule" plausible. For example, if we develop a TMDL plan to address sediment, but later determine early BMPs are not working well, the County will want to revise the projects list and schedule. Locking the County into a final date and detailed schedule runs counter to the concept of adaptive management.

The Draft Permit also assumes that meeting the WLAs is technically feasible, financially affordable, and generally practicable. This is a false assumption as evidenced by MDE's own experience with the Bay TMDL, where MDE determined that WQS could not be met in a portion of the Bay, even with an

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[58] The County assumes that its TMDL planning document need not include the Bay TMDL. The restoration requirement, which is clearly meant to serve as the way the MS4 will address the Bay TMDL, is included in a separate section than the general planning section. In addition, there is no applicable WLA in the Bay TMDL to include in the plan, as all Maryland MS4s were reflected in aggregated regulated stormwater load. To make this clear, we have suggested edits in the MEP Permit.

[59] Other commenters may argue that 40 C.F.R. §122.44(d)(vii)(B) requires that effluent limits in NPDES permits are "consistent with the assumptions and requirements of any applicable wasteload allocation for the discharge prepared by the State and approved by EPA." However, the introductory paragraph to 122.44 applies the requirements in the section, including (d)(vii)(B), only ***when applicable***. Subsection (d) references water-quality based effluent limits, which are not applicable to MS4s given the unique MEP standard in federal law. Subsection (k) is the only part which arguably applies to MS4s. It authorizes the use of BMPs for stormwater discharges or when numeric effluent limitations are infeasible. MDE agreed that subsection (d) does not apply to MS4 permits in its arguments regarding the Montgomery County MS4 permit before the Montgomery County Circuit Court: "The regulations applicable to municipal stormwater therefore are not 122.4 or 122.44(d), but is 122.44(k), the regulation authorizing the use of BMPs to control stormwater." MDE Memo, p. 14.

extremely expensive level of control. MDE adopted and EPA approved a variance in response. That required years of modeling and public process, yet the Draft Permit assumes the County can undertake this kind of analysis in just one year.

That said, the County will voluntarily install BMPs to the MEP to address applicable TMDLs if the permit makes expectations for this work clear and achievable. Recommendations for changes follow in (ii) through (v) below, and are also reflected in the MEP Permit.

ii. Watershed Assessments Should Be Limited to the Service Area

Requiring County-wide watershed assessments is overly broad. As explained above, MDE has no legal authority to order action outside of the County's MS4 service area. Further, the County will concentrate restoration efforts in the service area, making an assessment of other areas unnecessary and a waste of limited resources.

iii. The Assessment and Planning Sections are Duplicative and Confusing and Should Be Corrected

The County believes it makes sense to break assessment and planning down into three distinct sequential steps—assessment, planning, and implementation. However, if MDE leaves the structure as it is currently written, the language should be revised so that assessment measures are in the assessment section and planning measures are in the planning section. For example, prioritizing "all structural and nonstructural water quality improvement projects" is included in Part IV.E.1.b (Watershed Assessments); the very similar "[i]nclude…a detailed schedule for implementing all stormwater structural and nonstructural water quality improvement projects..." is included in Part IV.E.2.b (Restoration Plans). Detailed scheduling should come after prioritizing projects. The permit requirements are backwards in this regard.

iv. Local Planning Efforts Should Not Be Federally Enforceable

The County objects to making restoration plans an enforceable part of the permit.[60] If the County accepts the permit, we will develop a reasonable approach to addressing applicable WLAs. Respectfully, however, this is the County's program, and we question MDE's authority to micro-manage it through a planning document. We believe that the State's authority to oversee MS4 efforts does not extend to regulating local decision-making on specific aspects of our approach.

MDE itself recently argued for a limited State role in implementation efforts in litigation involving the Industrial Stormwater General Permit.[61] In the appeal of that GP, environmentalists argued that the GP should have allowed for public notice and comment on the Stormwater Pollution Prevention Plans (SWPPPs) each permittee must prepare. MDE explained SWPPPs are not effluent limitations under either state or federal law, but are merely "implementation plans that contain information to assist both

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[60] Part IV.E.2.b of the Draft Permit states that: "Upon approval by MDE, these restoration plans will be enforceable under this permit."

[61] Environmental Integrity Project, et al. v. MDE, Case No. 24-C-13-007219 (Circuit Court for Baltimore City).

facilities in meeting their permit obligations, and the Department in its compliance responsibilities…." Further: "SWPPPs do not contain restrictions or prohibitions on anything, but merely document control measures and procedures." Only permits and permit limits are subject to public participation requirements.[62]

In the context of the Draft Permit, the development of a TMDL restoration plan is no different than the development of a SWPPP by an industrial permittee. One of the BMPs in the Draft Permit requires that the County develop restoration plans to address EPA approved TMDLs. How the County chooses to address this mandate is the County's decision. The County is willing to consider MDE and public input on our restoration plans, and even to accept MDE approval or disapproval of their terms, but we not believe we should be put at risk for federal enforcement based on a local planning document.

v. MDE's Stormwater Accounting Guidance is Flawed and Should Not Be Referenced in the Permit

Referencing MDE's *Stormwater Accounting Guidance* in the Draft Permit is inappropriate. In addition to the reasons laid out in the MEP Analysis, the County objects to the reference for the following reasons.

First, in the *Stormwater Accounting Guidance* MDE has determined that only facilities built after 2002 are treated to the MEP. Not only is this inconsistent with the Phase II WIP, but it unfairly excludes stormwater facilities approved before 2002 that were designed to the MEP standard at the time. MDE has effectively re-written history and is requiring the County to revisit these determinations.

Second, the County is highly concerned that the "value" of various BMPs (i.e., the efficiencies associated with each) may change over time. We assume MDE will reflect those changes in future versions of the *Stormwater Accounting Guidance*. Although credits should be given based on the latest scientific evidence regarding BMP efficiencies, efficiency updates should not result in "downgrading" of certain BMPs. These kinds of changes should not be held against the County, as we will have invested years and millions of dollars in their installation.

The County requests that the *Stormwater Accounting Guidance* remain guidance and not be incorporated as an enforceable term in the MS4 permit. This will allow MDE the flexibility to change the document over time as necessary, and to apply or not apply it to particular situations in its discretion.

5. The Permit Should Authorize Trading

As noted above, the Draft Permit does not incorporate the trading concept included in the WIP. This is a mistake. MS4s could greatly benefit from an open and transparent state trading program. For example, according to a study performed by the Chesapeake Bay Commission, allowing significant point sources and urban stormwater sources to trade could potentially reduce Bay compliance costs "by as much as

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[62] Answering Memorandum of the Maryland Department of the Environment at p. 17 ("Although facilities are required to prepare a SWPPP as a condition of the Permit, the practices set forth in a SWPPP are not enforceable conditions and thus, cannot be categorized as permit limits."). A copy of the Answering Memorandum is attached as Appendix O.

79% to 82%." [63] In addition, the State has supported trading as a part of developing its nascent Accounting for Growth (AfG) policy. On its AfG website, MDE notes: "To ensure that there are sufficient credits available, the State is designing its AFG policy to induce a **robust nutrient trading market** in Maryland, which would, in turn, lower pollution reduction costs, especially for local government, developers, tax and rate payers, and accelerate the Bay's restoration."[64] (Emphasis in original)

Given that this is the State's position, the County can think of no reason why MDE should not be willing to add an authorization for trading to the MS4 permit.[65]

6. MDE Is Overreaching With the Special Programmatic Conditions

The Draft Permit includes Special Programmatic Conditions relating to the Chesapeake Bay TMDL and Comprehensive Planning. For the reasons explained in the attached MEP Analysis, the County objects to both terms and requests that MDE strike them from the permit.

7. MDE Should Not Federalize State Law Requirements

The Draft Permit inappropriately incorporates State law requirements, and thereby, federalizes them. Federalization triggers federal enforceability and penalties, typically different and far beyond what was contemplated when the State requirement was established, including federal citizen suit enforcement in federal court rather than state court.

As explained in the attached MEP Analysis, one problematic section is the Water Resource Element (WRE) requirement. Another is the Draft Permit mandate that the County's stormwater management program "[i]mplement the stormwater design policies, principles, methods, and practices found in the latest version of the *2000 Maryland Stormwater Design Manual*." The County reiterates that if state law mandates are referenced at all, they should be acknowledged but not made a condition of the Draft Permit. Mandates that the County comply with state law regarding erosion and sediment control and cooperate to develop WREs are both based solely on state law (federal laws do not address E&S compliance, except to the extent these types of issues are included in a permit for stormwater runoff from a construction site, or local planning issues).

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[63] *See* Chesapeake Bay Commission's *Nutrient Credit Trading for the Chesapeake Bay*, *An Economic Study* (May 2012) at p. 47. A copy of the study is available at: http://www.chesbay.us/Publications/nutrient-trading-2012.pdf and is attached as Appendix P.

[64] Available at the following URL:

www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Pages/Accounting_For_Growth.aspx

[65] In addition, the County should be authorized to perform restoration work outside of its service area if it is advantageous to do so. Recommended edits to allow for this are provided in the MEP Permit.

Each of these programs is a major undertaking in its own right with many associated activities and details. The County's concern is that if it is doing a good job at implementing these programs and addressing program improvements required by MDE, the County should not be subjected to EPA or citizen enforcement over what are minor details of program administration. EPA Region III is routinely conducting audits that are designed to flag minor items as Clean Water Act violations (*e.g.*, a missing date on an inspection report, a misfiled inspection report, or performing an inspection). What MDE and the County may view as improvement opportunities, others may characterize as deficiencies and violations. The County should not be subjected to the very harsh federal liability scheme ($37,500 per day per violation for each day until the violation is corrected) for purely state law matters. Further, the intent of the state law is not to expose the County to such liability risks in carrying out these state laws.

For these reasons, we ask the Department to make the textual changes recommended in the MEP Permit. Note that the requested revisions in no way diminish the County's obligation under state law to carry out the program or MDE's ability to insist on corrective action and full compliance by the County.[66]

8. The MS4 Permit Should Not Impose Potential Liability for Third-Party Behavior

The County agrees with the goal of reducing acts or behaviors of third parties that negatively impact water quality. However, just as MDE works to improve water quality but cannot ensure standards are always met by third parties, or as a police department works to stop crime but cannot ensure that crimes are not committed, the County can work to improve third party behavior but cannot guarantee or control the actions of those parties.

The Draft Permit contains several provisions requiring the County to "eliminate" and "ensure" actions or conditions beyond its reasonable control. MDE should make appropriate revisions that reflect the County's role as MDE's co-regulator with regard to the acts of third parties as reflected in the MEP Analysis and MEP Permit. [67] We hope MDE appreciates the serious level of concern over provisions that might be read by third parties or by a court as making the County responsible for the acts or omissions of third parties. Specific sections are identified in the MEP Analysis.

9. Other Comments Regarding the Draft Permit

i. MDE Should Clarify Text Regarding Triennial Inspections

Part III.D.1.d would require inspections of ESD treatment systems and structural stormwater management facilities on a triennial basis. The County objects to this as onerous. An explanation of our practical concerns with this term is provided in the attached MEP Analysis.

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[66] In the alternative, MDE could add a savings clause to the permit that makes clear that although the MS4 permit is a joint federal and state permit, state-law only requirements (for example, E&S, ESD, and WRE) are not federally enforceable.

[67] In addition to being beyond our control, these requirements are vague. The County cannot ascertain from the face of the permit what will be expected for compliance. This is inappropriate and unreasonable.

Additionally, Maryland's statutes do not require triennial inspections on individual residential lots. Section 4-203 provides: "(b) The Department shall adopt rules and regulations which establish criteria and procedures for stormwater management in Maryland. The rules and regulations shall: …. (7) Specify the minimum requirements for inspection and maintenance of stormwater practices;…."[68]

COMAR 26.17.02.11.A requires that "maintenance requirements established in this regulation shall be contained in all county and municipal ordinances and shall provide for inspection and maintenance. The owner shall perform or cause to be performed preventive maintenance of all completed ESD treatment practices and structural stormwater management measures to ensure proper functioning. The responsible agency of the county or municipality shall ensure preventive maintenance through inspection of all stormwater management systems. The inspection shall occur during the first year of operation and then at least once every 3 years after that." MDE has interpreted this language in discussions with the County and in hearings with the Maryland House of Delegates' Environmental Matters Committee to mean that the existing statute allows for alternative approaches to inspection such as statistical sampling of ESD practices with public education and outreach to address the ESD inspection requirement; the Educational Best Management practice has the benefit of informing landowners that the features are on the property and should be maintained. We have not yet seen such clarifying language in either the draft permit or draft fact sheet.

For the reasons provided therein, MDE should revise the Draft Permit as suggested in the MEP Permit to provide flexibility on the design of a triennial inspection program.

ii. Litter and Floatables Text is Vague and Legally Questionable

Part IV.D.4 of the Draft Permit requires that the County "address problems associated with litter and floatables in waterways that adversely affect water quality." Specific requirements include: considering litter issues as a part of watershed assessments; developing a public education program to reduce littering and increase recycling; and annually evaluating and reporting on the status of efforts to implement the public education program.

The County is concerned that the Draft Permit would have serious budgetary and operational impacts on our community. A full explanation of these programmatic concerns is provided in the MEP Analysis.

From a legal perspective, the Draft Permit term as it is currently written under subpart (a) is impossible in that it is unclear what level of effort the County would have to make to document "all litter control problems" or what would constitute appropriate corrective actions in order to remain within compliance. The "elimination" language is problematic because it implies that the County will be able to eliminate all litter. Just as a police officer can work to reduce the crime rate but cannot be responsible for the elimination of all crime, the County can work to reduce litter and floatables but cannot guarantee their elimination.

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[68] Md. Code Environment §4-203(7).

For the reasons provided herein and in the MEP Analysis, MDE should delete this text from the Draft Permit.

iii. Good Housekeeping Requirements Are Too Broad

Part IV.D.5.b.v of the Draft Permit would require that the County ensure that "all County staff receive adequate training in pollution prevention and good housekeeping practices."

The County has no objection to training appropriate employees in pollution prevention and good housekeeping. However, we question why ***all*** employees must receive this training. We do not see the need to train an administrative support professional working at a desk in a County office building, for example, on how to minimize oil leaks from County vehicles into the MS4. These dollars are much better spent providing more in-depth training to fleet service employees, for example.

For these reasons, MDE should adopt the textual changes in this section provided in the MEP Permit.

iv. Attachment A Should Include a Phase-In Period

The Draft Permit mandates that the County submit certain data "in a format consistent with Attachment A." Attachment A includes examples of various databases the County must complete with its Annual Report.

MDE is currently working on a new "geodatabase" with a goal of improving communications with EPA regarding progress that the State is making in WIP implementation. The geodatabase is still a work in progress. If MDE makes future changes that create a mismatch with Attachment A, the County will be at increased risk that EPA, the State, or a third-party could inappropriately argue it is out of compliance with the permit. In addition, it will take the County time to convert its existing data, making it only fair that MDE give the County a phase-in period to adjust to any new requirements.

For these reasons, MDE should make the textual changes to Part V.A.2 recommended by the MEP Permit.

v. Green Card Training Should Be Deleted

Part IV.D.2.b of the Draft Permit mandates that the County conduct E&S personnel certification classes at least twice a year. MDE is now providing these classes on-line. For this reason, we request that MDE strike this permit requirement.

10. Suggested Revisions to the Draft Fact Sheet

In addition to the requested changes to the Draft Permit reflected in the County's MEP Permit, the Department should make revisions that are consistent with these edits to the Fact Sheet. For ease of reference, the County has attached a redlined version of the Fact Sheet hereto as Appendix Q.

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